HIGH COURT OF UTTARAKHAND AT NAINITAL

(Court's order whether the case is or not approved for reporting)

Description of the case
S.A. No. 87 of 2005

Indian Drugs & Pharmaceuticals Ltd.
Anti Biotic Plant Rishikesh

Vs.

M/s Gannon Bunkerley & Company Ltd.

Approved for reporting.

Date of Decision: 04.12.2007.

Initial of Judge:

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HIGH COURT OF UTTARAKHAND AT NAINITAL

SECOND APPEAL NO. 87 OF 2005

Indian Drugs & Pharmaceuticals Limited,
Anti Biotic Plant,
Virbhadra, Rishikesh, District – Dehradun.
.....Defendant/Appellant.

Vs.

M/s Gannon Bunkerley & Co. Ltd.,
A company incorporated and registered under the Indian Companies Act VII of 1973. Having its Registered Office at Chartered Bank Building, Second Floor, Fort,
Bombay. .....Plaintiff/Respondent.

Dated: 4.12.2007

Hon'ble Rajesh Tandon, J.

Heard Sri V.K. Bisht, Sr. Advocate, assisted by Sri Sudhir Singh, counsel for the appellants.

2. By the present Second Appeal filed under Section 100 of the Code of Civil Procedure, appellant has prayed for setting aside the judgment and decree dated 25.8.2005 passed by the Additional District Judge / V- Fast Track court, Dehradun in Civil Appeal No. 461 of 1986 ***Indian Drugs & Pharmaceuitcals Limited Vs. M/s Gannon Bunkerley & Co. Ltd.*** arising out of judgment and decree dated 23.6.1986 passed by the IInd Additional Civil Judge (Sr. Division), Dehradun in Original Suit No. 333 of 1979 ***M/s Gannon Bunkerley & Co. Ltd. Vs. Indian Drugs & Pharmaceuitcals Limited.***

3. Briefly stated, a suit was filed being Original Suit No. 333 of 1979 ***M/s Gannon Bunkerley & Co. Limited Vs. Indian Drugs & Pharmaceuticals Limited*** for recovery of security deposit amounting of Rs. 71,320/- along with pendente lite interest @ Rs. 8% and futre interest @ 9% per annum.

4. According to the case of the plaintiff, the plaintiff is a company incorporated under the Indian Companies Act VII of 1913 and having its Registered Office at Chartered Bank Building (Second Floor), Fort Bombay. Shri A.K. Banerjee is Deputy Chief Engineer and a Principal Officer able to depose to the facts of the case. The plaintiff carries on businesss of merchants, engineers and contractors. The defendant is also a company incorporated under the Indian Companies Act having its Anti Biotics Project at Virbhadra, Rishikesh within the District of Dehradun. The plaintiff entered into a contract with the defendant for the construction of Intake Well Work in the Plant Area of Defendant at Rishikesh under a Contract Bond No. AR/PE/142 of 1964-65 (hereinafter referred to as the 'said contract') and the work was completed to the entire satisfaction of the defendant on 29.2.1967. The final bill was also prepared on 2.4.1973. According to the plaintiff, at the time of tendering for the work, Rs. 16,000/- was deposited as earnest money with the appellant which was converted into security deposit on the acceptance of the tender and the plaintiff was further required to make security deposit and accordingly from different running bills, Rs. 55,320/- was deducted by the defendant as security deposit and thereby a total amount of Rs. 71,320/- remained as security deposit with the defendant. In clause 17 of the general condition of the contract, it was provided that the security deposit shall not be refunded before the expiry of six months after the issuance of the final certificate or otherwise of

completion of work of till the final bills is prepared and passed whichever is later. Relevant clause of the condition of the contract is to the following effect:

> "The security deposit of the contractor shall not be refunded before the expiry of six months after the issue of a certificate final or otherwise of completion of work or till the final bill has been prepared and passed, whichever is later."

5. The final bill was prepared on 2nd April, 1973, but the defendant did not pay the security deposit to the plaintiff despite various letters, communications and meetings. The plaintiff made demands of its dues in respect of above work as well as four other civil engineering works by letters inter alia dated 26.8.1971. Thereafter the defendant in its letter No. AR/EE/III/C-ACCTT/71/1253 dated 6th September, 1991, wrote to the plaintiff that their claims are under examination in office and on completion of their security the plaintiff will be informed accordingly. In its letter No. AR/CME/72/1074/dated 29.11.1972 received by the plaintiff on 5.12.1972, the defendant sent a record note of discussions held between the officers of the parties regarding the finalization of the plaintiff's bills on 11.10.1972. Earlier, the plaintiff had vide letter dated 26.8.1972, again requested the defendant for settlement of his claims wherein an alternative prayer for appointment of arbitrator had also been made, in pursuance whereof the defendant had by its letter No. AR/CME/72-138 dt. 13.9.1972 called upon the plaintiff to come on 27th and 28th September, 1972 for discussions regarding their claims in pursuance whereof the aforesaid meeting dated 11.10.1972 had taken place. On 22.3.1973 again meetings were held and 29.7.73 was fixed for finalization of the bills of the plaintiff pertaining to civil engineering contracts including the above work. The defendant

further in its letter dated 8.11.1973 No. AR/CME/73/3983 dt. ½.11.73 and No. IDP/2 (39) WKS. 1880 stated that the payment could not be made till the question of recoveries of the minus amount of mechanical bills is settled, which were already under process. Further the defendant also asked for specific disputes regarding the contracts. The plaintiff wrote a letter to the defendant on 25.4.1974 asking therein for appointment of an arbitrator. Again, the plaintiff wrote to the defendant vide its letter No. D/CE/185/1804 dt. 17.7.1976 asking payment of the security deposit for the above work. In reply whereof the defendant wrote letter No. AR/CE/A-1./76/2956 dt. 29.9.76 stating therein that the defendant had a right to adjust the money due to the plaintiff against some other works and that the same had been adjusted. The said contention of the defendant was repudiated by the plaintiff in its letter No. D/CE/185/-003496 dt. 11/12-10-1976. The plaintiff continued reminding the defendant for payment through its variouis letters and personal approached including letter dated 9/10.2.1978. Thereafter, the defendant wrote a letter no. IDP ®/CE/A-2(M)/78/637 dt. 6/8-3-78 asking for the break up of the amount billwise and contract-wise later receipt of which, having reconciliation made therein, the defendant would give suitable date for plaintiff's representative to visit the former's office. Again the plaintiff kept on reminding the defendant for make the due payment, but in response to plaintiff's letter No. D/CE/185/3159/1 dt. 21.8.79, the defendant wrote vide its letter No. IDP (P) /CE/APB-2-79-5105/29 dt. 30th Aug 79 that the disputes relating to mechanical works are under arbitration and that as soon as the award is given, the same will be finalized. Plaintiff has submitted that the defendant admitted its liability of the suit money in its various letters and communications

dated. 6.9.1971, 13.9.1972, 11.10.1972, 29.11.1972, 22.3.1973, 23/25.4.1973, 14.5.1973, ½.11.1973, 8.11.1973, 29.9.1976, 23.6.1977/29.6.77, 6/8.3.1978, 16.9.1978, 4/6.10.1978, 24.11.1978, 19.1.1979 and 29/30.8.1979. Hence, the suit was filed.

6. A written statement was filed by the defendant, wherein it has been stated to the following effect:

> "27. That under the contract, the defendant has a right to deduct 10% of the value of the work in each bill after excluding cost of material supplied by the defendant by way of security deposit. The Clause 1 of the general conditions of the contract is produced below:-
>
> "The person/persons whose tenders may be accepted (hereinafter called "the Contractor") shall permit the Project authorities at the time of making any payment to him for wok done under the contract to deduct 10% of value of the work in each bill after excluding cost of materials supplied by the Company for which purpose the amount as computed by the Project authorities shall be taken as final till 10% of the contract values excluding the cost of materials issued by the company subject to a maximum amount of Rs. 1,25,000/- is realized.
>
> Such deductions are to be held by the Project authorities by way of Security Deposit. The project authorities for this purpose shall be entitled to recover ten percent of the amount each running bill calculated on the above basis till the amount of Security Deposit is realized. The Earnest Money converted into initial Security Deoist will be adjusted only at the last stage to make up the required amount of Security Deposit specified above. All compensation, liquidated damages or other sums of money payable by the contractor under the terms of this contract may be deducted from or paid by the

sale of a sufficient part of his Security Deposit, or form the interest arising there from or from any sums which may be due t or may become due to contractor from the Project authorities on any account whatsoever. In the event of his Security Deposit being reduced by reason of any such deductions or sale as aforesaid, the contactor shall withibn 10 days make good in cash any sum of sums which may have been deducted from, or raised by dsale of his Security Deposit or any part thereof."

The Security deposit was for satisfactory performance of the work. A sum of Rs. 71,320/- was deducted from the running bills, the sum includes Rs. 16,000/- deposited by way of earnest money. It is wrong to say that any trust was created. In-fact, the aforesaid amount represents 10% of the value of the work. At no material time was any acknowledgement made by the defendant or its officers. The final bill was prepared on 2.4.73 and the work was completed on 28.2.67. The plaintiff could claim payment of the aforesaid amount on 2.4.73 and time will begin to run from the said date. The present suit is not within the time."

7. In paragraphs 29, 30, 31 and 32 of the written statement, it has been admitted to the following effect:

"29. That besides the contract AR/PE/142/1964-65 for the construction of In-take Well work in the plant area, the following Civil & Mechanical contracts were also given to the plaintiff. All the contracts were inter-linked.

i. Raw material Block CB No. 48/PE/63/64.

ii. CRL, QC & PP CB No. 91/PE/64-65.

iii. Industrial pipelines CB No. 217/PE/66-67

iv. F&M Block CB No. 76/PE – 66- 64.

v. CB No. 154/DCE/65-66. Installation of Mech. Equipments at BTP"

vi. CB No. 177/DCE 65-66. Installation of Mech. Equipments in plant.

30. That all the contracts relate to Antibiotics Plant at Rishikesh and were carried out at Virbhadra.

31. That the parties had convenanted that the defendant had a right to make appropriation in part or in whole against the amount lying to the credit of the plaintiff in any of the contract. Clause 30 of the Contract-Bond, in question is re-produced below:

"Whenever any claim, against the contractor for the payment of a sum or money arises out of or under the contract, the company shall be entitled to recover such sum by a appropriating, in part or whole, the security deposit of the contractor, and to seel any Govt. promissory notes etc., forming the whole or part of such security. In the event of the security being insufficient or if no security has been taken from the Contractor, then the balance or total sum recoverable as the case may be, shall be deducted from any sum then due or which it any time thereafter may become due to the contractor under this or any other contract with the company. Should this sum be not sufficient to cover the full amount recoverable, the contractor shall pay to company on demand the balance remaining due."

That the corresponding clause in respect of the mechanical contracts given to the plaintiff is also re-produced below:-

4.7

i. "Whenever any clam against the contract for the payment of a sum of money arises out of or under the contract, the company shall be entitled to (entitled to) recover such sum by appropriating in part or whole, the security deposit of the Contract, and to sell any

Government securities etc., forming the whole or part of such security. In the event of the Security Deposit being insufficient the balance or the total sum recoverable, shall be deducted from any sum due or which at any time thereafter may become due to the Contractor under this or any other Contract with the Company. Should this sum be not sufficient to cover the full amount recoverable, the Contractor shall pay to the company on demand the balance remaining due.

ii. The company shall have the right to cause an audit and technical examination of the works and the final bill of the Contractor including supporting vouchers, abstract etc. to be made after payment of the final bill and if as a result of such audit and technical examination any sum is found to have been overpaid in respect of any work done by the Contract under the contract or any work claimed of the over payment and it shall be lawful for the company to recover the same from him in the manner prescribed in sub-clause (1) of this clause or in any other manner legally permissible and if it is found that the contractor was paid less than what was due to him under the contract in respect of such under payment shall be duly paid by the company to the contractor.

Provided further that no recovery of any over-payment and no payment of any sum paid short shall be made where such over-payment or under-payment has remained undiscovered for a period of three years after the date of payment of the final bill."

8. Both the parties have adduced their evidence in support of their cases.

9. On the pleadings of the parties, the trial Court has framed following issues:

> “1- D;k izfroknh dks dVkSfr;ka djus dk dksbZ vf/kdkj gSA vkSj D;k :i;k 71]320@& fyf[kr dFku ds iSjk 33 ds vuqlkj izfroknh ds lek;kstu vkSj mik;ksftr dj fy;s gSaA ;fn gka rks bldk izHkko \
>
> 2- D;k dksbZ izfrHkwfr Hkqxrku ;ksX; ugha fd gS tSlk fd fyf[kr dFku esa dgk x;k gS \
>
> 3- D;k okn i= l{ke O;fDr }kjk izLrqr ,ao gLrk{kfjr ugha fd;k x;k gS \
>
> 4- D;k oknh C;kt gkfuiwfrZ gtkZuk ikus dk vf/kdkjh gS] ;fn gka rks bldk izHkko \
>
> 5- oknh fdl vuqrks"k ikus dk vf/kdkjh gS \
>
> 6- D;k okn le;kof/k ls ckf/kr gS \
>
> 7- D;k okn fooU/k fl)kUr ls ckf/kr gS \”

10. While deciding the issue no. 1 as to whether the deductions are possible in view of paragraph 33 of the written statement and the same can be adjusted, a finding has been recorded by the Civil Court that no deduction can be made. Relevant portion of the finding is quoted below:

> “blfy;s eSa bl fu"d"kZ ij igq¡prk gw¡ fd fyf[kr dFk ds iSjk 33 ds vuqlkj izfroknh us 71320@& dk lek;kstu vkSj mi;kstu ugha fd;k gSA bl rF; dk izHkko bl okn in ds fy;s ;g gS fd 71]320@& esa ls 17708-38 iSls dk lek;kstu gksus ds dkj.k :Ik;s 53]611-62 iSls tekur /kujkf’k dk lek;kstu ugha gqvk gSA”

11. While deciding the issue as to whether the security is not liable to be paid as has been mentioned in the written statement, the trial Court has recorded a finding that since it

has been observed in issue no. 1 that from security of Rs. 71320/- a sum of Rs. 53,611.62 has not been adjusted, therefore, the said security is liable to be paid as both the parties admitted the completion of concerned work and preparation of the final bill. This issue has been decided accordingly.

12. While deciding the issue the plaint has not been filed and signed by a bonafide person, the trial Court has recorded a finding to the following effect:

> “oknh ds okni= ds rF; ds lEcU/k esa Kku u gksus ds izfr vufHkKrk izdV dh gS tcfd oknh us Li"Vrk vius vkidks Hkkjrh; dEiuh vf/kfu;e ds vUrxZr iathd`r dEiuh gksuk trk;k gSA Jh ,0ds0 cuth ftuds }kjk ;g okn izLrqr fd;k x;k gS] dks izeq[k vf/kdkjh oknh dh vksj ls crk;k x;k gS tcfd izfroknh us dsoy bl rF; ls badkj fd;k gS fo”fo’ks"k :i ls ,slk ughsa dgk gS fd ;g izeq[k vf/kdkjh uk gksdj D;k gSA vizR;{k :i ls ;g Hkh izfroknh dh vfHkLohd`r gh gS fd oknh us lk{kh la[;k 1 Jh ,0ds0 cuthZ }kjk 'kiFkiwoZd dFku esa dgk x;k gS fd Jh ,0ds0 cuthZ oknh dEiuh ds izeq[k vf/kdkjh gSA foijhr blds dksbZ lk{; vfHkys[k ij izfroknh dk ugha gS 29 fu;e 1 O;ogkj izfdz;k lafgrk esas ;g izkfof/kr gS fd fdlh fudk; }kjk vfHkopuksa dks mlds lfpo vFkok funsZ’kd vFkok nwljs eq[; vf/kdkjh }kjk gLrk{kfjr izekf.kr fd;k tk ldrk gSA ,0vkbZ0vkj0 1971 lqizhe dksVZ i`"B 740 esa gkde flag foijhr eSllZ xEer bUnz fyfe0 ds ekeys esa ekuuh; loksZPp U;k;ky; }kjk ;g vof/kfjr fd;k x;k gS fd d0 vf/kfu;e ds varxZr iathd`r dEiuh vkns’k 29

fu;e 1 O;ogkj izfdz;k lafgrk ds varxZr fudk; gSA blfy;s oknh dEiuh dh vksj ls mlds ize[k vf/kdkjh Jh ,0ds0 cuthZ }kjk gLrk{kfjr ,ao izekf.kr okn i= l{ke vf/kdkjh }kjk gLrk{kfjr ,ao izekf.kr okn i= gSA vr% okn in rn~uqlkj fofuf'pr fd;k tkrk gSA"

13. While deciding the issue no. 4 as to whether the plaintiff is entitled to get compensation along with interest, the trial Court has recorded a finding to the following effect:

"tgka rd iSjk 23 esa okn in ds yEcu le; essa 15 izfr'kr okf"kZd dh nj ls C;kt ,ao vfUre :Ik ls Hkqxrku gksus rd Hkfo"; ds izfr 9 izfr'kr okf"kZd C;kt dh nj ls C;kt lEcfU/kr oknh dk dFku gS bl laca/k esa esjh jk; esa O;ogkj izfd;k lafgrk dh /kkjk 34 dk izkfo/kku iz;ksT; gS ftlds vuqlkj okn ds yEcu le; esa 6 izfr'kr okf"kZd C;kt dh nj ls C;kt fnyk;s tkus dk fo/ksd U;k;ky; dks izzkIr gS vkSj Hkfo"; ds fy;s ml nj ls Hkh C;kt fnyk, tkus dk fo/ksd U;k;ky; dks izkIr gS tks fd mHk;i{k ds chp O;kikfjr laHkoogkj lkfcr gks tkus dh n'kk esa vuqcfU/kr nj rFkk Bsdsnkj ij C;kt ik;k tk;sA mHk;i{k ds chp fookfnr lafonk O;kikfjd lafonk gks] bl vk'k; dk lk{; fdlh i{k }kjk ugha fn;k x;kA ,slh ifjfLFkfr esa /kkjk 34 O;ogkj izfdz;k lafgrk ds izkfo/kku dsoy 6 izfr'kr rd gh C;kt fnyk;k tkuk U;k;ksfpr le>rk gw¡A"

14. While deciding the issue as to whether the suit is time barred, trial Court has recorded a finding that since the plaintiff has admitted his liabilities, therefore, the suit is not time barred.

15. While deciding the issue as to whether the suit is barred by the principles of estoppel, the trial Court has recorded a finding that since the plaintiff has himself admitted the adjustment of Rs. 17703.75 in the final bill by the defendant, therefore, the suit is barred by principles of estoppel.

16. While deciding the issue with regard to relief, the trial Court has recorded a finding that the suit is not time barred, and the defendants have admitted the deposit of Rs. 91,320/- as security by the plaintiff and adjustment of Rs. 17,703.38 has been proved, therefore, after deducting the said amount, plaintiff is entitled to get the rest of the amount from the defendants.

17. After recording the said findings, the trial Court has decreed the suit of the plaintiff for recovery of sum of Rs. 53,611.62 along with pendentelite interest @ 6% per annum.

18. Against the said order, the defendant/appellant went in Appeal by filing Civil Appeal no. 461 of 1986. The said appeal was dismissed by the lower appellate Court by recording a finding to the following effect:

> "The lines of this letter 85 B as reproduced above clearly shows that at one point the appellant has acknowledged its liability of Rs. 40,393.29 to pay to the respondent company. These lines are the acceptance of jural relationship. It was acknowledged by the appellant company in this letter that certain amount was due to the respondent and the amount has also been specified which is mentioned earlier, i.e. Rs. 40,393.29 but in the same letter in succeeding sentence the

appellatne company has mentieond that they had right to adjust and they have made adjustment. It is clear by the letter 85B that jural relationship was admitted by the appellant. The appellant company had admitted that Rs. 40,393.29 was due to the respondent company. But finally the appellant disowned the liability and claimed to have made such adjustment.

In the case of Tilak Ram (supra) as cited by the Learned counsel for the appellant it was held that a statement to be an acknowledgement must relate to the subsisting liability to the right claimed and in the case of Karam Dai [ALR (36) 1949 madras 401], it was held that when the statement of liability is coupled with a statement that it is discharged a subsisting liability on that day can not be inferred. These case laws have been cited by the Learned counsel for the appellant.

In the case of M/s Lakshmiratan Cotton Mill, (AIR 1971 S.C. 1482) the Hon'ble Apex Court has referred the Judgment of Tilak Ram (supra) and the same principle of law was followed.

In the case of Food Corporation Cotton Mill, (AIR 1971 S.C. 1482) the Hon'ble Apex Court has referred the Judgment of Tilak Ram (supra) and the same principle of law was followed.

In the case of Food Corporation of India [2005 (98) RD 326] the Hon'ble Apex Court considered the law laid down in the case of M/s Lakshmiratan Cotton Mill (AIR 1971 SC 1482) and has clearly laid down the law and as quoted above, it was held that disputing the liability to repay the amount acknowledged to have been received does not dilute the fact of acknowledgement in so far as Section 18 of the Limitation Act is concerned.

The facts of the present case are more or less the same. In its letter dated 29.9.1976 paper 85B, on the one hand, the appellant had admitted the liability but on the other hand, they disowned the liability by claiming it to have been adjusted. In view of the law laid down in the case of Food

Corporation of India (supra), this admission of the appellant as contained in leter 85B amounts to acknowledgment as defenied U/s 18 of the Limitation act. Therefore, this Court is of the view that on 29th September, 1976 the appellant has acknowledged their liability in writing and this acknowledgement extends the period of limitation for further three years from 29th September, 1976. This period expires on 28th September, 1979. According to it the present suit could have been filed before 28th September 1979. The suit was filed on 27th September, 1979, i.e. well within limitation.

Accordingly this court is of the view that the said suit is not barred by limitation and the findings of the Learned Court below on this point is also in accordance with law and it requires no interference.

Point No. 2 is decided accordingly.

No other point is raised before this court in this appeal. On the basis of above discussion, this court is of the opinion that the impugned judgment and decree is passed in accordance with law and it requires no interference and this appeal is liable to be dismissed."

19. As will appear from the aforesaid, the lower appellate Court has confirmed the findings recorded by the court below and dismissed the appeal filed by the appellant/defendant.

20. In view of the aforesaid since both the courts below having recorded the findings of fact and the same cannot be interfered under Section 100 of the Code of Civil Procedure.

21. In ***H.P. Pyarejan Vs. Dasappa 2006 AIR SCW 715,*** the Apex Court has observed as under: -

> "Under Section 100 of the Code (as amended in 1976) the jurisdiction of the High Court to interfere with the judgments of the courts below is confined to hearing on substantial questions of law. Interference with findings of fact by the High Court is not warranted if it involves re-appreciation of evidence."

22. In view of the aforesaid, I do not find any reason to interfere under Section 100 of the Code of Civil Procedure. Further, I do not find any substantial questions of law involved in this Second Appeal and the Second Appeal is concluded by the findings of fact and deserves to be dismissed.

23. Consequently, Second Appeal is dismissed. No order as to costs.

(Rajesh Tandon, J.)
4.12.2007

Rathour